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IN THE

Supreme Court of the United States

October Term, 1963.

No. 753.

DANIEL KIRK,
Plaintiff and Appellant,

v.

CHARLES H. BOEHM, Superintendent of the Department of Public Instruction, Commonwealth of Pennsylvania, et al.,
Defendants and Appellees.

MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION TO AFFIRM.

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Deputy Attorney General for Charles H. Boehm, Superintendant of Public Instruction, Department of Justice, Harrisburg, Pa.

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OCTOBER TERM, 1963.

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DANIEL KIRK,

Plaintiff and Appellant,

v.

CHARLES H. BOEHM, SUPERINTENDENT OF THE DEPARTMENT OF PUBLIC INSTRUCTION, COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Defendants and Appellees.

MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION TO AFFIRM.

Motion to Dismiss.

Appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the Appeal be dismissed on the grounds that the Appeal is not within the jurisdiction of this Court because not taken in conformity to statute and to the revised Rules of the Supreme Court of the United States in that:

(1) The Appeal has been filed out of time;

(2) The Plaintiff-Appellant by his own motion moved to dismiss his own Appeal;

(3) The three-judge Court did in fact dismiss Plaintiff's Appeal by Order of July 10, 1963, which Order is unappealed from;

(4) The Plaintiff-Appellant by letter of January 6, 1964 has indicated he does not intend to prosecute this Appeal any further.

Motion to Affirm.

Appellees, in the alternative, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the final judgment and Order of the District Court be affirmed on the ground that the question is so unsubstantial as not to need further argument.

Statement.

This is a direct appeal from the final judgment and Order by a District Court of three judges, specially constituted pursuant to 28 U. S. C., Section 2284, dismissing Plaintiff's Complaint which sought to enjoin the enforcement of an amendment to the Pennsylvania Public School Code of 1949 (24 P. S. Section 1-101 et seq.) on the ground that the amendment was contrary to Article IV, Section 4 of the United States Constitution. The amendment provided for the reorganization of school districts within the Commonwealth of Pennsylvania.

Appellees moved to dismiss the Complaint for failure to state a claim upon which relief could be granted. The three-judge District Court concluded that the Complaint raised a non-justiciable political question and therefore should be dismissed for failure to state a claim upon which relief could be granted. Accordingly, an Order was entered under date of May 1, 1963, dismissing the Complaint.

On May 27, 1963, Plaintiff filed notice of Appeal to the Supreme Court of the United States from said Order.

On July 8, 1963, Plaintiff, by letter addressed to the District Court, which was regarded as a Motion and notice to dismiss the Appeal, asked that his Appeal be dismissed. Accordingly, by Order of Court dated July 10, 1963, the District Court did, in fact, dismiss the Appeal.

Subsequently, Plaintiff-Appellant filed several other Motions to dismiss his first Appeal as moot, joined with further Motions to join the Fourteenth Amendment, Sec-

tion 2, and to join additional Constitutional claims which Motions were respectively dismissed by the three-judge District Court.

On October 7, 1963, Plaintiff-Appellant filed an additional Motion to combine a Fourteenth Amendment equal protection clause claim, which Motion was, by order of the District Court, denied by Order dated October 16, 1963.

On November 14, 1963, Plaintiff filed a second notice of Appeal to the Supreme Court of the United States. The jurisdictional statement was duly filed in the Supreme Court of the United States and docketed January 13, 1964.

Appellees have now filed a written Motion to Dismiss and in the alternative a Motion to Affirm the judgment of the lower Court.

Argument.

Act No. 561, adopted by the General Assembly of the Commonwealth of Pennsylvania, on September 12, 1961, established procedures to be followed in connection with the reorganization and merging of school districts of the Commonwealth. Plaintiff, in propria persona, filed his Complaint under 28 U. S. C. A. 1343(3) seeking to have said Reorganization Act declared unconstitutional as violative of the republican form of government guarantee clause of the Federal Constitution, and seeking to enjoin the Defendants from proceeding with the consolidation of school districts as required by said Act. Named as Defendants were Charles H. Boehm, Superintendent of Public Instruction, David Gerard, the former Executive Director of the Governor's Committee on Education, and individual members of the Delaware County Board of School Directors of Delaware County, Pennsylvania, the County in which the Plaintiff's children attend school.

Plaintiff-Appellant's objections related to Section 3 of Act No. 561, which added to the Public School Code of 1949 a new subdivision under Article II, entitled "(h) Reorganization of School Districts". Under the provi-

sions of this subdivision, the State Council of Education was required to adopt standards for the approval of administrative units of school districts and each county board of school directors was required, on or before January 1, 1963, to prepare and submit to the Department of Public Instruction a plan for organization of administrative units for the County, conforming to the standards adopted by the State Council of Education. The Act further provided that "on January 1, 1965, all administrative units contained in plans of organization of administrative units approved by the State Council of Education shall constitute and be deemed established as school districts, and shall belong to the class to which they are entitled as provided by law". Appellant's principal contention and the basis for bringing his action in the Federal Court was that Act No. 561 violated Article IV, Section 4, of the Federal Constitution which guaranteed to the States a republican form of government. Under careful questioning by the three-judge Court (Notes of Testimony 19 and 20) the Plaintiff-Appellant indicated that on final hearing he would present no evidence of unconstitutionality—he would do nothing more than introduce Act No. 561 into evidence.

The three-judge Court, upon motion of the Defendant-Appellees, dismissed the complaint for failure to state a claim upon which relief could be granted, concluding that "Plaintiff's claim is based solely and exclusively on Article IV, Section 4 of the United States Constitution; it is not combined with and does not depend on any other constitutionally protected right, cf. *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). As an exclusively Article IV, Section 4 claim, plaintiff's complaint raises a non-justiciable political question and must be dismissed. *Baker v. Carr, supra; Highland Farms Dairy, Inc. v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937); *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930); *Mountain Timber Co. v. Washington*, 243 U. S.

219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio*, 241 U. S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916); *Marshall v. Dye*, 231 U. S. 250, 34 S. Ct. 92, 58 L. Ed. 206 (1913); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912); *Luther v. Borden*, 7 How. 1, 48 U. S. 1, 12 L. Ed. 581 (1849)".

As the Order was entered May 1, 1963, the instant appeal to the Supreme Court of the United States, notice of which was filed November 14, 1963, has clearly been filed out of time and must therefore be dismissed.

Additionally, Plaintiff-Appellant, by his own Motion, on July 10, 1963, requested that the three-judge District Court dismiss his previous appeal to the Supreme Court of the United States which had been taken on May 27, 1963. In pursuance of the Plaintiff's motion, the three-judge Court did, in fact, on July 10, 1963, enter an Order dismissing the Plaintiff's appeal to the Supreme Court of the United States. This Order, as well, is unappealed from.

Finally, as recently as January 6, 1964, Plaintiff-Appellant by letter of January 6, 1964 (see appendix) indicated by letter addressed to the members of the three-judge Court to the Solicitor General and to counsel for parties of record: "For reasons unrelated to this action, I will not prosecute this Appeal under any circumstances."

Besides the complete lack of a jurisdictional foundation for the Appeal in the present posture of this case, the matter now before the Court is so unsubstantial as to not require further argument and accordingly the final judgment and decree of the District Court should be affirmed. The reorganization provisions of Act No. 561, which Plaintiff has attacked in his amended Complaint, have been repealed by Act No. 299 of 1963, passed by the Legislature and signed by the Governor of Pennsylvania August 8, 1963, and became effective the same day. This new Act not only establishes different criteria for the con-

solidation of school districts, but provides within its own framework for appeals by any school district considering itself aggrieved by a plan of organization of administrative units submitted by the County Board of School Directors. The plan for Delaware County has not yet been filed as of this date.

Perhaps most significant of all is the clearly correct ruling by the Court below that as an exclusively Article IV, Section 4 claim, Plaintiff's Complaint raises a non-justiciable *political* question and must be dismissed. See *Kies v. Lowry*, 199 U. S. 233, 26 Supreme Court 27 (1905). Such conclusion is fully consistent with the decision and analysis of the Court in *Baker v. Carr*, 369 U. S. 186, 82 Supreme Court 691, 7 Lawyer's Edition 2d 663 (1962).

We therefore respectfully submit that:

(1) The state of the record demonstrates that this Court is without jurisdiction, the Appeal not having been timely taken and having been dismissed on Plaintiff's own Motion, and therefore should be dismissed; and

(2) That in addition, the Appellant presents no substantial question for decision of this Court; and that the judgment and order of the District Court should be affirmed.

JOHN D. KILLIAN, III,

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LEWIS B. BEATTY, JR.,

Attorney for William Taylor, Jr., Paul M. Shipley, Edith J. Zarr, Frederic W. Swamer, Bruce L. Ritz, Ralph L. Rogers, and William J. Frasch, Jr.

APPENDIX.

January 6, 1964.

The Honorable Harry E. Kalodner, Circuit Judge
The Honorable Thomas J. Clary, Chief District Judge
The Honorable Alfred L. Luongo, District Judge
The Honorable Archibald Cox, Solicitor General
The Honorable Walter E. Alessandroni, Attorney General
John D. Killian, III, Deputy Attorney General
Lewis B. Beatty, Jr., Esq., County Board Solicitor

Gentlemen of the Court and Gentlemen Counsel:

Re: Civil No. 32323.

If a favorable decree had been entered on my prima facie case in May, 1963, conditional upon my combining an Article I, Section 2 and Section 4, constitutional claim, and thereby distinguishing justiciable from non-justiciable Guaranty Clause claims, there was every likelihood that extreme political pressure would have been brought upon the Office of the Attorney General of the United States either to prosecute the defendants and the Governor's Committee on Education for conspiracy or to desist from involvement in civil rights matters in other states. (See *U. S. v. Classic*, 313 U. S. 299.) I do not believe it should be necessary to speculate upon the explosive nature of the issue. Evidence external to this action, in the form of a letter to the President-Elect dated November 21, 1960, which was acknowledged, and a letter to the Office of the Attorney General of the United States to the attention

of Mr. David L. Hackett, dated May 15, 1961, copies of which were sent to the Honorable Alfred L. Luongo by letter of May 8, 1963, establish my full awareness of the issue. (Note also the pertinence of paragraph 9 of the Amended Complaint and the nature of my replies to the Court's questions concerning my right to vote.)

I believe it is also well established that the issue cannot be avoided if the parties to this action are to have the benefit of the District Court's ruling with respect to the republican character of the public school system in the Commonwealth. How then can I avoid imputing criminal conduct to the defendants? Had counsel for the defendants promptly observed local rule 16, this problem could have been faced at the outset. I have not felt at liberty with the Court to discuss this question on the remote chance that there remained still another solution, the disclosure of which to me might have provoked accusations of a different nature.

I believe therefore that a stipulation should be entered into by all counsel appropriately covering the points set forth above, substantially as follows: We do respectfully stipulate to the Court that it enter such decree as it would have entered had the plaintiff not rested his case on April 29, 1963, that the Court dismiss plaintiff's Notice of Appeal filed October 14, 1963, and that the Court confine the liability of defendants for all matters connected with this suit exclusively to such liability as the Court shall impose upon them pursuant to this civil action.

Such a stipulation as I have requested would establish a proper attitude between counsel and the Court for all future dealings in this case, would set an example of public respect for the Court, would, of course, protect the defendants and others similarly situated, and would afford protection to myself and those close to me.

The attempt to identify my right to vote with that of the local and county electorates requires, perhaps a clearer explanation than it has hitherto received and, per-

haps, the stipulation should contain a request for a specific ruling thereon. The present action may quite easily be translated into an action against the legislature on appeal by the following jurisdictional question:

> "Under a republican form of government does a state legislature have administrative power to delegate to local and county school districts for the purpose of administering the public schools separately from other local and county government without disparaging the citizen's right to vote?"

I do not believe that I should be required to depart even that far from the theory of my case. I should be entitled to the benefit of the protection afforded me by identification with the local and county communities I have known and who have known me all my life. The plaintiff in *Wilson v. Philadelphia School District*, 328 Pa. 225 (1937), was the Mayor of Philadelphia. The plaintiff in *Barth v. Philadelphia School District*, 393 Pa. 557 (1958), is even now a member of the Board of Education of the School District of Philadelphia. Such plaintiffs need no special identification with the community when they attack state legislation. But the otherwise unidentified plaintiff needs this extra protection, as also does the court which upholds him. In support of my contention that electorates, as such, should be entitled to federal protection under the Guaranty Clause, I submit that Title 4, Section 320, Pennsylvania Statutes Annotated, enacted the same year as Public Law 561, is invalid as an example of one-way local option, although sustained as a proper delegation of legislative power. See *Houchert v. State Harness Racing Commission*, 403 Pa. 440 (1961).

As applied to the specific question of the administration of the public schools, the interests of the electorate may be said to arise in the following particular ways:

> a) Since the time of their establishment over a century ago the public schools have been locally ad-

ministered, the legislature evidently having employed local government devices separately as a means of circumventing local community opposition. The history of local administration of public schools is too deeply ingrained in this country to make acceptable a decree requiring direct supervision by the General Assembly through appointed officials, even if the Court were to determine that the General Assembly had the administrative power to delegate, distinct from the power to tax.

b) Article X, Section 1, of the Pennsylvania Constitution, which did not become a part of the basic law of the Commonwealth until 1870, see *Wilson, supra*, at 231, does not mandate implementation inconsistent with the Guaranty Clause.

c) The primary responsibility to educate the young belongs, not to the state, but to the parents of the young. A legislatively administered public school system would lack that responsiveness to local voting interest which gives the local government its variety and its strength.

d) Since the date of filing of my Motion To Further Amend The Complaint, April 15, 1963, the General Assembly itself has moved rapidly in the direction of consolidating local public school with local city government administration in Philadelphia. The Court may note these significant legislative developments.

With this communication I believe that I have sufficiently accounted to all who are connected with this suit. I believe that it is now the responsibility of some one other than myself to move this matter forward. For reasons unrelated to this action I will not prosecute this appeal under any circumstances. It has served a useful and con-

structive purpose. I do request, however, that no favorable decree be entered in this action until after January 26, 1964.

Very respectfully,

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